MOVING FORWARD WITH FEDERAL REFORMS

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Through the enactment of the *Commercial Arbitration Act* ("*Commercial Arbitration Act*"),[1] the federal government adopted the 1985 version of the UNCITRAL Model Law, although with some significant changes. While arbitration is not a subject matter falling within federal constitutional jurisdiction, it is within the federal government's jurisdiction to legislate with respect to the liability of the Crown and federal Crown agents.[2] The enactment of a set of adjudicative rules to govern dispute resolution in contracts binding the federal government, such as the *Commercial Arbitration Act*, falls within this federal power. However, there are two large legislative gaps with the current state of affairs at the federal level. Firstly, the *Commercial Arbitration Act* does not include the amended 2006 UNCITRAL Model Law, which has been adopted by a host of nations and instead relies on the 1985 version. There are important differences between both versions and the *Commercial Arbitration Act* is not current. Secondly, the *Commercial Arbitration Act* applies only to commercial disputes — both domestic and international — leaving an important gap as it relates to the arbitration of non-commercial disputes that involve the federal government. The fixes necessary to deal with both legislative gaps are relatively simple. Firstly, amending the *Commercial Arbitration Act* to incorporate the 2006 version of the Model Law requires a simple amendment. Secondly, as it relates to non-commercial disputes, the enactment of a set of

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[1] *Commercial Arbitration Act*, RSC, 1985, c 17 (2nd Supp) [*Commercial Arbitration Act*].

[2] *Rudolph Wolff & Co v Canada*, [1990] 1 SCR 695, 1990 CanLII 139 (SCC) [*Rudolph Wolff*].

arbitration rules is also within federal constitutional powers.[3] The federal government has a number of options in this regard.

I. COMMERCIAL ARBITRATION ACT: 1985 VERSION OF THE MODEL LAW

The *Commercial Arbitration Act* adopts the Model Law developed by the United Nations Commission on International Trade Law ("UNCITRAL") on June 21, 1985 ("Code"), although with some important changes to account for the division of powers between the federal and provincial governments. The Act is also the vehicle used to arbitrate admiralty and maritime cases as well as international trade disputes. The enactment of the *Commercial Arbitration Act* was seen as an important accomplishment, allowing Canada to align itself with other nations in creating a level playing field in commercial dispute resolution. The *Commercial Arbitration Act*, in combination with the New York Convention, which was also given legal force through federal legislation,[4] creates a regime that allows for an expedited dispute resolution process that is able to transcend national borders and, more specifically, allows a judgment debtor in a commercial dispute to quickly satisfy an award through the domestic courts.

Canada, as a federal state, had some added challenges when adopting the Model Law in its jurisdiction. Legal effect could only be given to the international commitments if the provinces enacted the Model Law, which they did, with some minor modifications in some cases.[5] A level playing field was created at the domestic level which was aligned somewhat with that of other nations that had also adopted the Model Law. A set of

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[3] *Rudolph Wolff, supra* note 2.

[4] *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp.).

[5] See for example: *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sched 5.

uniform dispute resolution rules that were understood by all nations was erected.

While Canada and the provinces enacted the 1985 version of the Model Law, there were some important differences between the various provinces and between the provinces and the federal government. Canada, for instance, modified the Model Law to apply to all commercial arbitrations and not just international commercial arbitrations. Most provinces adopted the 1985 version of the Model Law without any significant changes to the text. Since its adoption in 1985, the gap has widened and the differences between the provinces and the federal government and even between provinces has amplified. There has been an uncoordinated response to the 2006 amendments to the Model Law in Canada which accounts for some of the more important differences. With the exception of Ontario and British Columbia, all other jurisdictions continue to rely on the 1985 version of the Model Law. The end result is that the remedies available in some jurisdictions as they relate to international commercial arbitration are greater in some jurisdictions than in others, depending on which version has been adopted.[6] The interim measures and preliminary order provisions of the 2006 version of the Model Law which are found in article 17, for example, are far more expansive than what exists under the 1985 version of the Model Law. The reason for the delayed response by some Canadian jurisdictions in adopting the 2006 amendments remains unanswered, other than to say that legislative change is slow unless there is pressing commercial necessity. Having said that, in a highly competitive world where commercial parties often forum shop, it would make some sense for all Canadian jurisdictions to update the legislation to the most current version of the Model Law. There is nothing in the 2006 amendments to the Model Law that could not be rolled into the *Commercial Arbitration Act*

[6] See for example, *UNCITRAL Model Law on International Commercial Arbitration, 2006* at art 17.

or that could not be adopted by the provinces that continue to rely on the 1985 version.

Parties that arbitrate under the federal *Commercial Arbitration Act* are left with the 1985 version of the Model Law, which they can modify through contractual arrangements, where it is permissible to do so. Not all articles under the Code are open to amendment through agreement and some are hardwired. The equal treatment of the parties found at article 18 is, for example, an inalienable provision that cannot be modified as it would undermine the very essence of arbitration. The language and the internal logic to the Code must be respected in assessing whether parties can amend a given article. Although, there is not a universal understanding on what can be modified in the Model Law and what is hardwired, with different jurisdictions taking different views. Thus, parties to a dispute can adopt rules that modify the current version of the Model Law and, where possible, align themselves with the 2006 version of the Model Law. However, there are obvious limitations in that the rules must be the result of an arbitration agreement, or after a dispute arises, a submission agreement. Reaching agreement between commercial parties is not always an easy task.

II. ABSENCE OF LEGISLATION IN RESPECT OF NON-COMMERCIAL DISPUTES

The *Commercial Arbitration Act* is limited in application. Firstly, the Act applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation, or in relation to maritime or admiralty matters.[7] The Act is also used as a vehicle to settle trade disputes under the various trade agreements for which Canada is a signatory. This limitation provides the constitutional basis for the passing of the legislation. Secondly, the word "international", which appears in paragraph (1) of article 1 of the Model Law, was deleted from

[7] *Commercial Arbitration Act*, *supra* note 1 at s 5(2).

paragraph (1) of article 1 of the Model Law. Paragraphs (3) and (4) of article 1 of the Model Law, which contain a description of when arbitration is international, were also deleted. Thus, paragraph (5) of the Model Law appears as paragraph (3) under the *Commercial Arbitration Act*. The result is that the *Commercial Arbitration Act* is not limited to international disputes, but captures all commercial disputes that involve the federal Crown. Thirdly, the Code applies where the dispute is in relation to a commercial dispute. As regards the term "commercial", no hard and fast definitions are provided in the Model Law, in large part because agreement could not be reached by the UNCITRAL Working Groups. Instead, article 1 of the Model Law contains a footnote calling for "*a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not*".[8] The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial under the Code. Guidance has to be taken from the Code and reliance on domestic law should be avoided.[9] Regardless of the definition that is ascribed to the word “commercial” in the *Commercial Arbitration Act* and its scope of application, it remains that the Act only applies to commercial disputes. There is no federal legislation in relation to non-commercial disputes where the federal Crown is a party to the dispute. There is also subject matter that escapes the application of the Act, such as claims grounded in intellectual property statutes and the *Competition Act*.[10]

The problem that arises from a practical perspective is that claims can encompass both a commercial and a non-commercial component. In cases where the non-commercial component of a dispute does not stem from the commercial relationship, a claimant will either not pursue arbitration altogether or move

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[8] See *UNCITRAL Model Law on International Commercial Arbitration, 1994*.

[9] *Carter v McLaughlin*, [1996] CanLII 7962 (ON SC), 27 OR (3d) 792.

[10] *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2022 FC 418 (CanLII).

to bifurcate the proceeding and pursue the claim under two sperate forums, creating a multiplicity of proceedings. Although, the frequency with which these cases occur should not be overstated.

III. CONSEQUENCES ARBITRATING UNDER THE WRONG ACT

There are clear consequences from arbitrating under the wrong legislation. For decades, there was the common belief in the legal marketplace that the federal government could not arbitrate non-commercial disputes, even under provincial legislation. The absence of legislation coupled with the fact that the federal government had only legislated in relation to commercial arbitration led to this flawed conclusion. The federal government often refused to arbitrate non-commercial disputes. In more recent years, the federal government has allowed non-commercial disputes to be adjudicated under provincial arbitration legislation. The current thinking is that non-commercial disputes involving the federal government can be adjudicated under provincial arbitration legislation.

However, the limited application of the *Commercial Arbitration Act* is often ignored by counsel—it is used either to adjudicate non-commercial disputes or, alternatively, the parties to an arbitration will adopt provincial legislation to adjudicate a commercial dispute. The *Commercial Arbitration Act* states that it applies to arbitral awards and arbitration agreements whether made before or after the coming into force of the Act.[11] Thus, the clear intent of the legislation is to ensure that the Act applies whether or not the parties referred specifically to the *Commercial Arbitration Act* in the arbitration agreement. The *Commercial Arbitration Act* does not require the Crown and federal Crown agents to agree to arbitration under that legislation, but applies once they have exercised their power of contract and have agreed to arbitration. The combined effect of sections 5(2) and 5(3) of the *Commercial Arbitration Act* is that federal legislation has mandatory application where all

[11] *Commercial Arbitration Act*, *supra* note 1 at s 5(3).

preconditions have been satisfied. There is no opting out of the federal legislation in favour of a provincial legislation where the federal Crown is a party to the dispute and where the dispute is commercial. Having said that, a party to an arbitration agreement to which the federal Act applies has the right to specify rules that are different from those outlined in the Code, to the extent that the Code allows for it and to the extent that they can be accommodated. This allows the federal Act to be aligned somewhat with the provincial acts. However, not all articles in the Code can be amended to align the arbitration with a provincial regime. For example, an appeal right cannot be created through agreement. The legal result of arbitrating a non-commercial dispute under federal legislation or adjudicating a commercial dispute under provincial legislation could be dire. While there are no reported cases on this point, the basic rule is that the federal Crown is immune from the application of provincial arbitration statutes.[12] Thus, to the extent that parties to an agreement have incorporated provincial legislation and ignored the application of the federal Act to a commercial dispute, it is likely that the award is unenforceable against the federal Crown. The legal consequence could be the same where a non-commercial dispute is arbitrated under federal legislation that has no application.

IV. ULCC EFFORTS TO HARMONIZE LEGISLATION

There has been dialogue between the various levels of government as it relates to the domestic provincial arbitration acts and the international commercial arbitration acts. On the domestic arbitration legislation, the Uniform Law Conference of Canada (ULCC) has had some impact on Canada's legal landscape and some provinces have adopted the proposed legislation or some variation thereof, creating some uniformity across some jurisdictions as it relates to domestic arbitration legislation. The more recent ULCC report that was issued in 2016 has only been partially adopted by one province, namely British Columbia. Regardless, a great deal of work needs to

[12] *Gauthier v R* (1918), 56 SCR 176, CanLII 85 (SCC).

happen before the domestic arbitration acts of the provinces are aligned with international arbitration standards. The ULCC proposed legislation continues to embrace English arbitration concepts that should be abandoned in favour of a more simplified approach, as is the case with the Model Law. For example, the inclusion of a provision in provincial legislation that allows a party to escape a stay of proceeding where there is a possibility for a motion for summary judgment has no place in commercial arbitration. This is an example where the balance between arbitration and the courts is disrupted, allowing the courts to unnecessarily involve themselves in arbitral matters. Regardless, attempts to harmonize domestic legislation through the ULCC do not directly concern the federal government in that it does not occupy this field entirely. As it relates to the federal *Commercial Arbitration Act*, it can be applied to both domestic and international arbitrations, but not to non-commercial arbitrations and it thus straddles the domestic and international acts under review by the ULCC. Canada is likely to resist deviating from the Model Law, as presented by UNCITRAL. Maintaining some consistency across the various international signatories is likely to remain a preoccupation of the federal government. Thus, the impact of the ULCC on the evolution of federal legislation has been marginal.

V. FEDERAL CHOICES GOING FORWARD

There are a number of choices for the federal government going forward in dealing with the legislative gaps.

Firstly, as it relates to the current *Commercial Arbitration Act*, some thought will have to be given to updating the current Act and aligning it with the 2006 version of the Model Law. Claimants must be given access to the interim measures and preliminary orders provisions found in article 17 of the 2006 Model Law. The amendments are easy to achieve. When adopted, it will achieve some uniformity with the provinces, such as Ontario and British Columbia, that have adopted the 2006 version of the Model Law. It is expected that the remaining

provinces will eventually adopt the 2006 version of the Model Law.

Secondly, as it relates to the gap that exists with non-commercial disputes, there are a number of options.

The first option would be to allow for the status quo. When necessary, the federal government could use the provincial acts to adjudicate non-commercial disputes or, alternatively, include dispute resolution provisions into different pieces of legislation on a case-by-case basis, where necessary. The problem with the current state of affairs is that where a dispute encompasses both a commercial and a non-commercial dispute, a claimant is forced to abandon arbitration or bifurcate the claim and pursue two separate claims in two different forums. This leads to inefficiencies and generally dissuades parties from arbitrating a dispute with the federal government. Also, allowing arbitration to exist in various federal acts and in different forms would impede the uniform development of arbitration principles at the federal level.

A second option would be to pass legislation that deals only with non-commercial disputes that involve the federal government. The issue is whether Canada stays faithful to the Model Law or whether it gives in to what exists at the provincial level in common law jurisdictions that refuse to move away from the arbitration Act that was inherited from the United Kingdom. What is proposed by the ULCC at the domestic level is not an answer for the federal government in that it results in a lengthy act that is overly prescriptive in nature. It may also not be an answer for the provinces. It would also be difficult to justify such an act in a context where Québec has adopted the Model Law to resolve both commercial and non-commercial disputes.

A third option would be to amend the current *Commercial Arbitration Act* and allow it to be applied to commercial and non-commercial disputes. Only a few amendments would be necessary, including the title of course. Québec has adopted the

Model Law and allows it to be applied to both commercial and non-commercial disputes without issue. Québec is aligned with international standards which has put it at the forefront of arbitration in Canada. There is simplicity in approach and a common understanding as it relates to the law of arbitration in Québec, regardless of whether it is commercial or non-commercial. The Model Law was intended to be supplemented with domestic law. Thus, the Model Law is ideal for a federal state in that it can draw on different aspects of provincial law. The third option is the favoured option. The federal government has an opportunity to move the arbitration agenda forward by signalling to the provinces that the overly prescriptive approach found in the domestic acts must be abandoned and that there must be an alignment with international arbitration standards.